(16984)

IN SUPREME COURT

OF THE UNITED STATES.

No. 399.

GUARANTY SAVINGS BANK,

Plaintiff in Error,

vs.

ALBERT BLADOW,

Defendant in Error,

BRIEF OF DEFENDANT IN ERROR.

This action originated in the District Court of the Fourth Judicial District, of the State of North Dakota, wherein it was tried upon the stipulated facts set forth in the abstract and judgment rendered for defendant in error; from that judgment an appeal was taken by plaintiff in error to the Supreme Court of the State of

North Dakota, in which Court the judgment of the District Court was affirmed. The object of this appeal is to review alleged errors of the Supreme Court of the State of North Dakota.

The summary of facts in the brief of the plaintiff in error is correct, so far as it goes, but it fails to call the attention of the Court to fact No. 22, page 11 of the abstract, as stipulated. The special attention of the Court is, therefore, called to these facts: Notice of the hearing of the contest of Anderson's entry was duly served upon the entryman, in accordance with the rules of the Department of the Interior; testimony was taken upon such hearing pursuant to such notice, and from such testimony, the Commissioner of the General Land Office found and decided as a conclusion of fact, that the said Anderson had never resided upon the lands covered by said entry, as required by law, and that his said entry was fraudulent in fact. No appeal was ever taken by said Anderson, or by the plaintiff in error from such decision.

It may simplify matters somewhat, if, in the consideration of this case, it be borne in mind that by reason of the foregoing facts, the entry of Anderson upon the land involved, was fraudulent in fact; because it needs no authority to sustain the averment that a decision rendered by

the Commissioner of the General Land Office, upon a question of fact, he having jurisdiction of the parties and the subject matter in accordance with the rules of the Interior Department, is final and binding upon all other tribunals. 8

Therefore, as between Anderson, the entryman and his privies and the defendant in error, Bladow, the fact is established beyond question in this case, that Anderson's entry of the lands was fraudulent, and his rights, and those of his successors in interest, must be determined with reference to that fact. 9

Anderson's entry is dated June 6th, 1881, the mortgage of plaintiff in error being dated July 20th, 1881. On the 8th day of May, 1882, Anderson conveyed the land by warranty deed to one R. N. Ink, who, on the 7th day of April, 1883, by a like instrument, conveyed the premises to J. S. Ink, who, on the 6th day of January, 1885, by warranty deed, conveyed the premises to the defendant in error, Albert Bladow; all of these deeds being properly recorded. 10 11

Another fact of importance to be remembered is, that on the *14th day of March, 1882* the Commissioner of the General Land Office held Anderson's entry of this land for cancellation for evasiveness and insufficiency (Finding 13, page 9, Abstract). This was three yerrs before

Bladow obtained any interest, either in the land or the paper title thereto. Nearly four years after this holding by the Commissioner of the General Land Office, from which no appeal was taken, to-wit, on January 25th, 1886, Bladow commenced his contest of Anderson's entry. At the time of the commencement of this contest, that entry had been suspended, and held for cancellation, for a period of four years.

After the hearing of the said contest, to-wit, on the *14th day of November, 1887*, the Commissioner of the General Land Office finally canceled Anderson's entry, because the same was fraudulent.

After the cancellation of Anderson's entry, and *after Bladow's filing upon the land had been allowed, to-wit, on June 15, 1891*, plaintiff in error made proof of its mortgage in the Interior Department, and moved that patent be issued to it under Section 7, Act of Congress March 3, 1891 (26 St. 1095), which motion was denied by both the Commissioner of the General Land Office and the Secretary of the Interior. This motion was made *four years after the final cancellation of Anderson's entry and four years after the homestead entry of defendant in error, Bladow, had been allowed.*

Plaintiff in error specifies three errors in his

brief, first, that by virtue of Anderson's mortgage, 16
it acquired an interest in the land of which it could not be deprived without being made a party to the proceedings in the Land Department, served with notice and given an opportunity to be heard. Second, that the cancellatioa of Anderson's entry on the contest initiated by Bladow without notice to the plaintiff in error, was contrary to law, and 17
void. Third, that such cancellation being void, Anderson's entry was confirmed and patent should have been issued to the plaintiff in error upon his application therefor, under Section 7, of the Act of Congress, March 3, 1891, (26 St. 1095).

ARGUMENT. 18

That an entryman, under an entry, fraudulent in fact, acquires no vested property interests in the land entered as against the Government of the United States, is so well settled by decisions of this Court, that no authorities need be cited. That Anderson's entry was fraudulent in fact, is stipulated. 19

Under the Statutes of the State of North Dakota, of which this Court will take judicial notice, existing at the time when the mortgage of the plaintiff in error was given by Anderson, a mortgage of real estate gave to the mortgagee simply a lien upon such real estate and not a

20 property interest in it. Under such statutes, a mortgage of real estate conveys no title to, nor interest in the lands mortgaged. (Paragraph 4699 —4712, Revised Codes of North Dakota. A re-enactment of the same provisions from the Code of 1877).

21 A mortgage lien *is not an estate or interest in the land.*

(Power vs. Bowdle, 3 N. D. 107—111.)

This lien, like other equitable liens, is not an interest *in the land*, is neither a jus ad rem, nor a jus in re, but merely an encumbrance.

(1st Pomeroy's Equity Jurisprudence, 368, Page 503.)

22 Plaintiff in error took its mortgage with the knowledge of the law in this regard, as well as with knowledge of the law regarding fraudulent entries.

We believe the law to be well settled, that an honest entryman, whose entry is made in good faith, and who has complied with the re-
23 quirements of the law and the regulations of the Interior Department for the enforcement of that law obtains through his final receipt the equitable title to the land entered, and the Government of the United States simply holds the legal title in trust for him, pending the issuance of a patent, which is the Government's formal

deed of conveyance. Had Anderson's entry been 24
made in good faith, and had it not been fraudulent, a different question might be presented; but his entry being fraudulent ab initio, he obtained no rights whatever either in or to the land. The case of Bogan vs. Edinburgh Land Mortgage Company, 63 Fed. 192, cited by plaintiff in error, is one in which the entryman's 25
good faith is not questioned. He had simply failed to declare his intention to become a citizen of the United States, and this not fraudulently, but through ignorance. It is undoubted that where an entryman in good faith makes final proof to the satisfaction of the Register and Receiver of the Land Office, and receives 25
their final certificate, the honest entryman ac-
quires a vested equitable right to the land which can only be divested according to law.

(Johnson vs. Tousley, 13 Wall. 72–85.)

The Commissioner of the General Land Office may review and set aside the action or the Register and Receiver before the patent issues, where 27
their decision is induced by fraud, perjury or mistake, or results from an erroneous view of the law.

(Bogan vs. Mtg. Company, Supra and cases cited on page 194.)

But the supervisory power of the Commis-

sioner of the Land Office, or of the Secretary of Interior is not an arbitrary, unlimited or discretionery power, but a power that must be exercised according to law and not in violation or disregard of it. Where it is so exercised, and its exercise is not induced by fraud or mistake, the results it produces are sustained by the Court. Where its exercise has been induced by *fraudulent misrepresentations*, or by material mistake of fact, or where the power has been exercised in violation or disregard of the law, the results produced are uniformly so modified by the decrees of the Courts, that *those who are en titled, in equity to the titles to the lands, ultimately obtain them.*

(Bogan vs. Mtg. Company, Supra.)

This supervisory power was granted to these superior officers of the Interior Department for the very purpose, among other things, of preventing the securing of titles to the lands of the Government by fraud and for the purpose of correcting mistakes, both of fact and law, in relation to the disposition of such lands. It was no part of the intention of Congress in granting this supervisory power, to permit it to be used in furtherance of the perpetration of frauds. After the title has passed from the Government to an individual, the Courts of the country are all

open to anyone honestly aggrieved by errors in law in the conveyance of such lands by the Government or by the perpetration of fraud on the part of persons to whom such lands are conveyed. But the Courts of the United States and of the different states, are not open to litigants assuming to derive benefits from the fraudulent acts of the entryman and will not lend themselves to the indirect perpetration of fraud by so assisting claimants under fraudulent entries. It is the honest entryman whose rights both the Interior Department and the Courts are jealous of guarding. So the law has come to be settled that where the Government has parted with its title to lands to the wrong person, the right person may compel the conveyance of such lands to him upon showing, first, either the fraud or the mistake in law upon which the conveyance to the wrong person is based, and but for which such conveyance would not have been made, and, second, that he was entitled in equity and good conscience to a conveyance of the land to himself. It is not enough for him to show that the patent has been issued to the wrong person, but in addition to that he must show himself to be the right person entitled, in equity, to the title of which the patentee has either through fraud or mistake of law deprived him. In other

36 words, he must show a better title in equity than that of the patentee. This can never be done by persons claiming under entrymen, whose entries are fraudulent.

It is conceded by the plaintiff in error that its mortgage gave to it no better right to this land than Anderson, the mortgagor, obtained
37 through his fraudulent entry. It must be apparent that, as against the Government, Anderson obtained absolutely no right, title to, nor interest in the lands, either in law or in equity, by his entry. An entryman, making a fraudulent entry of public land acquires no vested right of property in it.

38 American Mortgage Company vs. Hopper, 64 Fed. 507.

U. S. vs. Peterson, 50 Fed. 507.

League vs. DeYoung, 11 Howard, 185.

Parsons vs. Venske, 164 U. S., 89.

Anderson's entry was fraudulent; the commissioner so found as a fact in the contest in
39 which he had jurisdiction. This Court cannot question that finding of fact. Plaintiff therefore, could acquire nothing but a lien upon whatever title Anderson had, *and he had none.*

In this case plaintiff in error could not be wronged or injured in any conceivable manner, unless the act of March 3, 1891, (26 St. 1095)

applies to this case, because every right of the 40
plaintiff in error depends upon its ability to show that the entry of Anderson was in fact made in good faith. It can make no difference whether that showing be made in the Interior Department, or in a court of competent jurisdiction; but, here plaintiff in error has come into a Court of competent jurisdiction and confessed by the 41
twenty-second statement of fact in the stipulation of facts, not only that it could not prove Anderson's entry valid, but that it was in fact fraudulent and void.

The refusal of the Land Office to grant plaintiff's motion for patent was right, first, because the entry of Anderson was *finally canceled and Bladow's entry was of record prior to the passage of the Act of March 3d, 1891.* 42
The final cancellation was made November 14th, 1887. Second, by the terms of Section 7 of that Act the patent *could not issue* if fraud on the part of the purchaser was found, or unless proof *satisfactory* to the Land Department of the sale or encumbrance be presented.

This Court has finally settled our first con- 43
tention in the case of Parsons vs. Venske, supra, in which the Court holds that the provisions of the Act of March 3d, 1891 (Chap. 561, 26 St. 1098) refers only to the existing entries, and

does not reach a case like the present, where the action of the Land Department in canceling the entry and restoring the land to the public domain took place before the passage of the act. As to the second contention: The motion was denied in the Land Department. This Court can not presume error in law to have been committed by the Land Office in the denial of this motion, when the denial *may* rest upon the grounds of the absence of material facts from the required proof. However that may be, this same question has been authoritatively settled in this jurisdiction in Mortgage Company vs. Hopper, 56 Fed. 74. That case is a well considered one, and we desire to call special attention to the opinion and the cases cited in it. In that case, the facts being almost identical with those in this, the Mortgage Company claimed the benefit of this Act of March 3d, 1891. The Court says "the protection of a bona fide purchaser relates to the legal title, or at least to such a right as is *completely determined.* So long as something remains to be done affecting the right, those purchasing do so at their own peril." True, the plaintiff relied upon the registers receipt, but as shown, this was not a finality, and the plaintiff knew it, or at least should have known it. The doctrine of bona fide purchaser is not ap-

plied to protect *an equity*, but to protect the 48
legal title against a prior equity by uniting with such legal title an equity arising from the payment of money and securing the conveyance without notice, and a clear conscience.

Boon vs. Chiles, 10 Peters 211.

Plaintiff's second assignment of error is, that the cancellation of Anderson's entry by the Com- 49
missioner of the General Land Office on the ex parte contest, initiated by Bladow without notice to plaintiff in error, was contrary to law, and void.

If all that plaintiff in error claims for the action of the Commissioner be conceded, such cancellation would not be void, but voidable 50
merely. It is conceded that the Commissioner had the power to make the cancellation, and it is only claimed that he could not make it arbitrarily, contrary to law or in disregard of the law. All this being true, his cancellation was good and valid as against both Anderson and the United States, and was, at most, only voidable as against plaintiff in error. Being voidable, and not void, the plaintiff in error could protect it- 51
self against such cancellation, in so far as it affected its rights only upon showing that the entry of Anderson was in fact valid. So long as it has conceded that this could not be done,

52 but that, on the contrary, the entry was fraudulent in fact, what wrong has the plaintiff in error suffered even if before its rights could be determined it was entitled to notice? It confesses itself entitled to no relief on the facts; then, how could injury be inflicted upon it, even if the course of the Commissioner be held erroneous?

53 But the course of the Commissioner was right. The plaintiff in error was not entitled to notice of the hearing of this contest. When plaintiff in error contends that Anderson had no interest in this land, or in the contest at the time the contest was initiated, it is in error, indeed. Anderson had executed and delivered a deed with full
54 covenants of warranty, among them being covenants of seizin and good title. He was liable to his grantee on those covenants. He was also liable to the plaintiff for the mortgage debt. No one else was responsible for its payment. So far as the record discloses, none of the persons who succeeded to Anderson's paper title assumed or
55 agreed to pay this debt, nor was it deducted from the purchase price of the land in any conveyance. Therefore, Anderson was the real party in interest. As to this feature of the case, the opinion of the Supreme Court of the State of North Dakota, which is here attacked as erroneous, is as able a brief as we can prepare.

If it were necessary to serve plaintiff in er- 56
ror with notice of the contest, it would have been equally necessary to serve Anderson's grantees, R. N. Ink and J. S. Ink, with such notice. Plaintiff in error, having simply a lien upon the land and not an interest in the land, stood in exactly the same position as would the county of Richland, or the State of North Dakota, if 57
taxes had been levied against the land, and the lien of such taxes attached to it under the Statutes of North Dakota. The lien of the plaintiff in error was of exactly the same character as the lien for taxes, although the one was created by contract and the other by operation of law. If the plaintiff in error, under its lien, had a 59
vested property interest in the land, so would the County and the State; yet, no one will contend that the State or the County would be a necessary party to the contest or need be served with process to enable the Interior Department to determine such rights, as they might have under their lien. A judgment creditor of Anderson's would have, under the Statutes of North Dakota, a lien, exactly similar in character to that of the 59
mortgage, yet we think it has never been contended that it is the duty of the Government, or of persons furnishing information to the Government in contest of entries of public lands, to

search the records in the several offices of the Register of Deeds, Auditor, Treasurer and Clerk of the State District Court, within the County in which the lands, affected by such contests, lie. It must be remembered that in contests of entries of public lands commenced after final proof has been made and patent certificate issued, the proceeding is not, like an ordinary contest, between the contestant and the entryman. The proceeding is between the Government of the United States and the entryman, upon information filed by the contestant. The contestant is not a party in interest, and need not even be a person competent to take an interest in the lands. An alien may furnish this information as well as a citizen. The person furnishing the information owes no duties to other persons interested in the land. He simply sets the Government in motion. The parties in interest in such proceeding are the Government and the entryman whose entry is attacked. It may be that in a case of bona fide entry and the conveyance of the land to innocent parties by deed passing title, notice should be given by the Government to the entryman's grantees, for in such case the entryman would have a vested interest in the land, which he might convey by deed; but, in case of fraudulent entries canceled prior to the passage

of the Act of March 3, 1891, even the grantee 64
under a deed made by the entryman has no
vested property interest in the land, such as to
entitle him to notice of proceedings in the land
department, looking to the cancellation of the
entry. The legal title had, at all times, re-
mained in the Government, the equitable title
never passes unless the entry is bona fide. The 65
idea of basing an equitable title upon a fraudu-
lent entry is too anomalous to require discus-
sion.

The third assignment by plaintiff in error has been disposed of adversely to its contention in the case of Parsons vs. Venske, supra.

Plaintiff in error contends that Anderson had 66
the legal right to mortgage the land, and the
mortgagee had the legal right to accept the
mortgage. If one person have the legal right
to mortgage lands belonging to another, and to
which the mortgagor has no right or title, then
the contention of plaintiff in error may be true.
But conceding its premises, the conclusion of the 67
plaintiff in error that it must follow as a mat-
ter of course that the mortgagee had a property
right in the land does not necessarily follow.
The mortgagee could get no greater right to or
interest in the land than Anderson had. Ander-
son had absolutely none. Plaintiff in error, when

it took its mortgage, simply got title to the paper mortgage; that was all Anderson had to give.

Plaintiff in error argues that the contest was initiated by Bladow surreptitiously, and with intent to defraud the plaintiff in error. The record does not justify this argument. All the proceedings, with the exception of the final proof of Anderson, were in perfect good faith, and the record so shows. Bladow, when the contest was initiated, had whatever interest in the land Anderson had to convey and no more. In addition to this he had the warranties of his grantors to which he might have recourse when Anderson's title failed, but it must be clear that he was not bound to sit idly by and see Anderson's entry of the land canceled and rely solely upon these warranties. Anderson had conveyed no title to Bladow, but Bladow had in no way bound himself not to procure title to the land from other sources in case of the failure of Anderson's apparent rights to it. He had as much right to obtain the title from the government, as he would have had to obtain an outstanding title from any other party, and this right carried with it the other right to proceed to obtain that title in the manner prescribed by the laws of the United States and the rules of the

Department of Interior. The record dis- 72
closes continual residence upon and improvement of the lands by Bladow and the erection thereon of permanent improvements of great value. (Finding of Fact 20, page 11, Abstract.)

Reduced to its simplest form, the contention of plaintiff in error is contained in folios 55, 56 and 57 of his brief, and is in effect that the 73
cancellation of Anderson's entry was void as to plaintiff in error, and that under the Act of March 3, 1891, the land should have been patented to plaintiff in error. It is enough to say of this contention that since this Court has held that that Act does not apply to a case like this, where Anderson's entry was finally cancelled and 74
the land restored to the public domain, prior to the passage of the Act, and since without the application of this Act plaintiff in error could have no rights except such as would be dependent upon proof of the good faith and validity of Anderson's entry, which proof it confesses in this Court, it could not make, no injury or in- 75
justice has resulted to plaintiff in error, whether it was entitled to notice in the contest or not.

Since the Act of March 3, 1891, does not and cannot apply to this case, the reasoning of the Supreme Court of the State of North Dakota in its decision in this case is impregnable.

76 The fact that no notice was served on the mortgagee did not render the cancellation a nullity as to the mortgagee. The Land Department has until a patent has been issued, complete control of the question whether it will cancel the entry. Its power is not dependent on jurisdiction over the person of anyone, as the authority of a Court
77 is. By the issue of a certificate it does not lose control over the land; such certificate is in effect no more than a statement that prima facie the person to whom it is issued appears to be entitled to a patent. Whether subsequent investigation will lead to a different conclusion is left unsettled, and whoever deals with the holder
78 of such certificate is chargeable with knowledge that the proceedings instituted to secure the legal title to the land from the Government are in fieri, and that the Land Department may at any time revoke the certificate, thus destroying the entryman's prima facie right to the patent. What proceedure it will adopt, what per-
79 sons it will notify, or whether it will proceed on notice at all or not, are matters within the discretion of the Department, so far as the mere matter of power is concerned, Congress not having prescribed any practice in such cases. No matter how arbitrarily the Land Department may act, its cancellation is not a mere nullity, but

such arbitrary action will, however, entitle the 80
entryman to a hearing in Court, and on this hearing, he will be allowed to show that as a matter of fact his entry was not fraudulent. But no such showing was made in this case. Indeed it is not claimed that the entry was not, in fact fraudulent.

The judgment in this case is right, and is 81
what, in equity and good conscience, ought to be the judgment in every similar case. We are not unmindful of the fact that if the debtor Anderson be insolvent, plaintiff in error has lost its money. So have hundreds of others who have invested in mortgages and tax certificates upon lands for which the patent certificates have eventually been can- 82
celed. It may be a hardship to the plaintiff in error, but the risk of this loss is one which it assumed when it dealt with the fraudulent entryman and the defendant in error has in no way contributed to, nor increased such risk. If, as stated, in the opinion of the case of Bogan vs. Mortgage Company, supra, it is the intention that the decrees of the Courts in these cases 83
shall vest the title to lands in those who are in equity and good conscience entitled to them, then this judgment is right and should be affirmed.

Respectfully submitted,

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